2001

State of Utah v. Karl Orellana : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20010045-CA
v.	:	
KARL ORELLANA,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM AN ORDER REVOKING PROBATION IN THE JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE L.A. DEVER, PRESIDING

KAREN A. KLUCZNIK (7912)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

MARK W. BAER
Assistant Attorney General

ATTORNEYS FOR APPELLEE

GREGORY G. SKORDAS
Gustin, Christian, Skordas
& Caston, L.L.C.
Boston Building, Suite 810
9 Exchange Place
Salt Lake City, Utah 84111

ATTORNEY FOR APPELLANT

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20010045-CA
v.	:	
KARL ORELLANA,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM AN ORDER REVOKING PROBATION IN THE JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE L.A. DEVER, PRESIDING

GREGORY G. SKORDAS
Gustin, Christian, Skordas
& Caston, L.L.C.
Boston Building, Suite 810
9 Exchange Place
Salt Lake City, Utah 84111

ATTORNEY FOR APPELLANT

KAREN A. KLUCZNIK (7912)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

MARK W. BAER
Assistant Attorney General

ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 20010045-CA**
v.	:	
KARL ORELLANA,	:	**Priority No. 2**
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an order revoking defendant's probation in connection with convictions for failing to file a tax return, a third degree felony, in violation of Utah Code Ann. §§ 59-1-401 and 76-8-1101; wilful evasion of income tax, a second degree felony, in violation of Utah Code Ann. §§ 59-1-401 and 76-8-1101; and pattern of unlawful activity, a second degree felony, in violation of Utah Code Ann. § 76-10-1603. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I. Did the trial court abuse its discretion in revoking defendant's probation where defendant consistently displayed his unwillingness to following the court's probation orders?

This Court "will not disturb the trial court's [revocation] decision unless the court's findings are against the clear weight of the evidence and the probation revocation was an abuse of discretion." *State v. Maestas*, 2000 UT App 22, ¶ 23, 997 P.2d 314.

II. Does this Court have jurisdiction to review defendant's consecutive sentences where defendant did not timely appeal from the trial court's sentencing order?

No standard of review applies to this issue.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following rules, relevant to this appeal, are attached at Addendum A.

Rule 22, Utah Rules of Criminal Procedure;
Rule 4, of the Utah Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS OF THE CASE

Defendant was charged with eleven counts of failure to make, render, sign, or verify personal income tax returns for the years 1992 to 1995 and quarterly sales tax returns for the years 1997 and 1998; seven counts of wilful evasion of sales tax for the years 1997 and 1998; and one count of pattern of unlawful activity (R. 1-8). Pursuant to a plea bargain, defendant pleaded guilty to one count each of failure to file a tax return and wilful evasion of income tax, and no contest to pattern of unlawful activity (R. 20, 44). The remaining counts were dismissed (R. 20, 44).

On December 17, 1999, defendant received suspended consecutive sentences of zero-to-five years for failure to file a tax return, one-to-fifteen years for wilful evasion of income tax, and one-to-fifteen years for the pattern of unlawful activity count (R. 44-47). He was fined $74,000 and ordered to pay restitution in the amount of $259,979.33 (R. 44-

47). Defendant was ordered to serve one year in jail and seventy-two months on probation (R. 44-47).[1] Defendant did not appeal from his sentence.

Three months later, at a review hearing held March 6, 2000, the trial court ordered defendant's early release from jail (R. 75). As part of his probation, defendant was to complete 500 hours of community service, including at least 40 hours per month, and pay the greater of $3000 or ten percent of his gross income monthly toward his fines and restitution (R. 46-47). In addition, defendant was ordered to provide the Utah State Tax Commission ("Tax Commission") with any documentation required to complete and verify his delinquent state income tax and sales tax returns (R. 143-44; R. 159:9; Court Docket).

In three letters dated April 4, 2000, May 17, 2000, and May 31, 2000, Becky McKenzie, senior income tax auditor with the Tax Commission, requested various documents from defendant in connection with his income tax returns (R. 76-80).

Review hearings were held April 17, 2000, May 15, 2000, and June 27, 2000, to monitor defendant's progress on his probation requirements (Court Docket).[2] At the

---

[1]Because defendant has not included a transcript of the sentencing hearing in the record on appeal, the trial court's reasons for ordering consecutive sentences and then placing defendant on probation are not known. However, the court likely determined that, despite the severity of defendant's criminal conduct, its nonviolent nature indicated that probation would not endanger the public but would allow the State to recoup some of its losses.

[2]Except for the June 27, 2000 hearing, no minute entries appear in the record concerning these hearings. Defendant did not request transcripts of them in connection with his appeal (R. 155).

April hearing, defendant indicated he "knows what he needs to do by 5-15-00" (*Id.*). At the May hearing, the trial court ordered that defendant would have two weeks after he received Ms. McKenzie's May letters "to respond or provide the requested information" (Court Docket).

June 27, 2000 Review Hearing

At the June 27, 2000 hearing, the State proffered that defendant had failed to respond to the reasonable requests of Tax Commission officials for documentation to complete defendant's delinquent tax returns, despite their multiple attempts to secure the documents (R. 159:6, 16, 20, 28, 32). In addition, several certified letters from the Tax Commission to defendant had been returned unaccepted (R. 159:7). Although defendant had provided some documentation that morning, Ms. McKenzie reported that information was either incorrect or was "basically what I already had" (R. 159:18).

Defendant admitted that he had turned over some of the records requested by the Tax Commission, but not all (R. 159:9). He stated that some of the records were tied up in bankruptcy court on a proceeding that has been settled for some time (R. 159:11). He claimed the documents remained inaccessible without a court order, and that he had not made copies before filing them with that court (R. 159:10). Other requested records were tied up in a different bankruptcy case; these also were inaccessible without an order (R. 159:26-27). Neither defendant nor his counsel could tell the court what type of order was necessary (R. 159:27-28).

When Ms. McKenzie questioned defendant's charitable contributions, defendant claimed he had canceled checks to substantiate his contributions; however, he gave no explanation for why he had not provided copies of them to Ms. McKenzie (R. 159:16, 36-37). The court noted, "If you don't want to supply the information, answer her questions, then you're just going to have to live with the assessments" (R. 159:38). Defendant responded, "Sir, I'm willing to supply anything that they ask that I have" (R. 159:38).

Concerning his fines and restitution, defendant admitted that he had paid nothing on them (R. 159:30). He claimed that he had not made any money "in three years" and that he had to borrow money just to keep his business, Insuite, afloat (R. 159:31). When asked what he was living on, defendant responded, "[w]e've borrowed about all we can" (R. 159:31).

Finally, defendant reported that he had performed only 72 hours of community service since being released from jail four months ago (R. 159:30). When asked why he had not done more, he explained that he had spent the time trying to keep his company alive (R. 159:31).

Throughout the hearing, the trial court voiced its frustration with defendant's performance. Concerning defendant's claim that his documents were tied up in bankruptcy court, the court stated: "I find that hard to believe . . . that anybody is going to give all --- the only copies they have of documents when they're involved in ongoing tax fraud issues (R. 159:10).

Concerning defendant's charitable contributions, the court stated:

> I mean you're standing right here and telling me you've got all the cancelled checks from your charitable deductions. You haven't bothered to even give your attorney [them] on a letter [from the Tax Commission] that's almost a month old asking for it. That didn't sound to me like you're doing what you say you're doing.

(R. 159:39).

At one point, the court concluded: "Seems to me that the only time anything happens in this case is when you come down to court and I have to get upset about something because you . . . aren't doing something" (R. 159:30).

The court then found that defendant's progress on his community service "is not sufficient" (R. 159:41). The court ordered that defendant complete 50 hours of community service a month with an organization approved by the prosecutor (R. 159:42). "I want an organization acceptable to the state. Something like the soup kitchen or the Salvation Army. . . . I don't approve of working in the store. I'm not going to approve working for [defendant's] Church either" (R. 159:43). "You don't want to do the 50 hours first working day of next month you report to jail. Serve 10 days in jail" (R. 159:42).

The court concluded that if defendant did not provide the necessary paper work to Ms. McKenzie, "she can go ahead and make the assessment . . . . You can come in here and fight whether or not the assessment is correct" (R. 159:42).

October 31, 2000 Probation Revocation Hearing

On September 19, 2000, the State moved for and the trial court issued an order to show cause why defendant's probation should not be revoked (R. 113-114).

At the evidentiary hearing held October 31, 2000, Ms. McKenzie testified that defendant had provided no additional information since the June 27 hearing (R. 160:15, 19). Because defendant had failed to provide the requested information, Ms. McKenzie was forced to subpoena records from Novell concerning defendant's stock (R. 160:17). Those records indicated that defendant had "grossly understated" his capital gains on the tax returns he filed pursuant to his convictions (R. 160:17).

Heidi Reilly, another Tax Commission official, testified that she had left messages seven or eight times requesting additional information from defendant concerning sales tax issues; that in response to those calls, defendant told Ms. Reilly to speak to his wife; and that his wife never returned her calls (R. 160:21-22).

In his defense, defendant testified that he had received no additional requests for information from Ms. McKenzie after the June 27 hearing (R. 160:46). He claimed he was not aware of any documents that had not been turned over to the Tax Commission, but then admitted he had receipts confirming his charitable contributions that he had not provided. He justified his failure by claiming that "[t]hey've never requested that" (R. 160:42, 79). Defendant stated that he referred Ms. Reilly to his wife because she handled

the records, but that Ms. Reilly had an open invitation to retrieve anything she needed (R. 160:48).

Concerning his fines and restitution, defendant admitted that he had still paid nothing (R. 160:8, 11). He explained that "[w]e've not been in a financial position to be able to [make any payments]" (R. 160:53). "We just don't have the monthly income that would provide for the minimum requirements in the order that was issued" (R. 160:53). Defendant admitted that he had not sought work outside of Insuite since his release from jail, even though Insuite was not able to pay him for any of his work (R. 160:55, 62). According to defendant, he lived on monies from his parents and his wife (R. 160:55). Although he brought no documentation to support his claim, defendant testified that his wife made only between $2000 and $3000 a month from Insuite (R. 160:56, 62-63).

Steven Peterson, an independent certified public accountant hired by defendant to testify as to defendant's financial condition and ability to pay the fines, stated that he had reviewed the 1999 and 2000 statements for a bank account at Zions Bank in defendant's and his wife's names (R. 160:82-84). He testified that "[v]ery consistently," the deposits were $3000 a month (R. 160:84).

Peterson explained that defendant had provided him with no information concerning the disbursements made from the Zions account or other accounts defendant might have (R. 160:87). However, Peterson did see two reports of monies deposited between North Springs Investments, a partnership in which defendant was the main

partner, and Insuite, defendant's company (R. 160:87). "Those reflected significant contributions of capital" (R. 160:87).

Defendant presented no additional documentation concerning either North Springs or Insuite's financial condition. Although required to do so, defendant had not filed any year 2000 quarterly returns for Insuite (R. 160:91, 93). Defendant claimed the partnership "generally never [had] more than two or $3,000" (R. 160:77).

Defendant's house was worth $480,000 (R. 160:65). It had a mortgage of $450,000, which, according to defendant, was delinquent by $16,000 (R. 160:76). He testified that the mortgage payments were made through a distribution from the partnership (R. 160:77). Defendant acknowledged that North Springs Investments owned two cars: a 1995 Land Cruiser and a 1997 Volvo (R. 160:65-66).

Finally, defendant presented documentation that he had completed fifty community service hours for each of the months of July, August, September, and October (R. 160:42). He completed those hours at the Salt Lake County Department of Public Works, a place that he chose on his own, laying cable, moving equipment, and working on the computer (R. 160:58, 60). No one at AP & P suggested that defendant complete his community service with the Department of Public Works (R. 160:64).

At the conclusion of the hearing, the trial court found that defendant had failed to supply the Tax Commission with the documents discussed at the prior hearing (R. 160:118). After noting as an example defendant's admission that he had some of the

information (the receipts for his charitable contributions) that he had not turned over, the court concluded that "Mr. Orellana has no desire to cooperate with the tax commission. He has no desire to comply with what I have asked him to do" (R. 160:118).

Concerning defendant's fines, the court noted that "[i]t was the intent of the court that the defendant pay [at least] something each month" (R. 160:116). To that end, the court ordered that the probation condition requiring defendant to pay at least $3,000 or ten percent a month to restitution and fines be stricken because it was confusing (R. 160:116).

Concerning defendant's completion of community service, the court found:

> . . . I specifically made a very clear [statement that] he was to pay fifty hours a month [of community service]. That he was to meet with the state and find an organization acceptable to the state to do this work. He didn't bother to do that. He used his own.
>
> He didn't supply any information to the court. Every month he was supposed to turn in his 50 hours. There's nothing in the file until today.

(R. 160:117).

The trial court then revoked defendant's probation (R. 160:118).

On November 20, 2000, defendant moved to correct an illegal sentence, claiming that the trial court had improperly revoked his probation (R. 142-47). The trial court denied the motion without a hearing (R. 139, 152).

Defendant timely appealed from his probation revocation and the denial of his motion to correct an illegal sentence (R. 150).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in revoking defendant's probation. Defendant was given ample opportunity to show the court that he was making bona fide efforts to fulfill his probation obligations. Instead, defendant consistently displayed his unwillingness to take them seriously.

This Court lacks jurisdiction to review defendant's consecutive sentences because defendant failed to timely appeal the trial court's sentencing order. In any case, defendant has not provided this Court with a transcript of his sentencing hearing; thus, this Court lacks an adequate record to review the trial court's sentencing decision.

ARGUMENT

I. DEFENDANT'S CONSISTENT FAILURE TO MAKE BONA FIDE EFFORTS TO FULFILL HIS PROBATION OBLIGATIONS SUPPORTS THE TRIAL COURT'S REVOCATION ORDER.

Defendant claims that the trial court "did not have just cause to revoke the Defendant's probation" because he "was making bona fide efforts to comply with the conditions of his probation[;] therefore any violation of the conditions was not willful." Aplt. Br. at 13.

A trial court "may revoke probation if, upon 'balanc[ing] the evidence, using discretion to weigh its importance and credibility, [it determines that] the probationer has more likely than not violated the conditions of probation.'" *State v. Maestas*, 2000 UT App 22, ¶ 23, 997 P.2d 314 (quoting *State v. Hodges*, 798 P.2d 270, 279 (Utah App.

1990)). "In each case all the surrounding facts and circumstances should be . . . carefully considered by the trial court." *State v. Spiers*, 12 Utah 2d 14, 361 P.2d 509, 511 (1961).

This Court "will not disturb the trial court's [revocation] decision unless the court's findings are against the clear weight of the evidence and the probation revocation was an abuse of discretion." *Maestas*, 2000 UT App 22, at ¶ 23. Thus, where defendant claims that the trial court erred because his probation violations were not willful, defendant must show "that the evidence of [his willfulness], viewed in a light most favorable to the trial court's findings, is so deficient that the trial court abused its discretion in revoking defendant's probation." *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990). Defendant cannot make that showing here.

"[A] finding of willfulness merely requires a finding that the probationer did not make *bona fide* efforts to meet the conditions of his probation." *Maestas*, 2000 UT App 22, at ¶ 24. If a defendant "'has willfully refused'" to abide by the terms of his probation "'when he has the means to [do so], the State is perfectly justified in using imprisonment as a sanction.'" *State v. Archuleta*, 812 P.2d 80, 84 (Utah App. 1991) (quoting *Bearden v. Georgia*, 461 U.S. 660, 668 (1983)).

Defendant claims in part that his probation violations were not willful because he "demonstrated that he was unable to meet the fine and restitution payment schedule . . . due to a lack of income." Aplt. Br. at 12. In support of his claim, defendant cites to *Bearden v. Georgia*, 461 U.S. 660 (1983). *Bearden*, however, does not help him.

In *Bearden*, the Supreme Court held that if a probationer "has willfully refused to pay [a] fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection." *Bearden*, 461 U.S. at 668. Similarly, if "a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution . . . reflect[s] an insufficient concern for paying the debt he owes to society for his crime," the State is "justified in revoking probation and using imprisonment as an appropriate penalty." *Id.* at 668, 672. It is only when a probationer has exerted "all reasonable efforts to pay . . . and yet cannot do so through no fault of his own" that the trial court must first "consider[] whether alternative methods of punishing the defendant are available" before revoking that person's probation. *Id.* at 669.

This Court applied *Bearden* in *State v. Archuleta*, 812 P.2d 80 (1991). There, this Court contrasted Bearden's bona fide efforts to meet his probation requirements with Archuleta's efforts. In *Bearden*, defendant borrowed money to make the first two payments towards his fine and restitution. *Archuleta*, 812 P.2d at 84. When he was laid off from his job, Bearden made "repeated documented efforts" to obtain other work and notified the probation office that his next payment was going to be late. *Id.* Moreover, Bearden demonstrated that he had "no assets" with which payments could be made. *Id.* "[I]n sharp contrast," Archuleta was employed for two months, voluntarily left that job, and then exerted no significant effort to find another. *Archuleta*, 812 P.2d at 85.

Moreover, he "did not pay any token amount of money to persuade the Court that he was mindful of his responsibility, and serious about discharging it." *Id.* (internal brackets and quotation marks omitted). Under such facts, this Court held that Archuleta's failure to pay was willful. *Id.* at 85.

Archuleta applies here. Defendant claimed that Insuite was not generating sufficient income for him to make his payments; however, he never even attempted to look for a job outside his company (R. 159:31; R. 160:55, 62). Although he borrowed money during the period he was on probation, he put all of it into his company rather than making even a token payment on his fines or restitution; he claims he borrowed all he can despite evidence of equity in his home and assets in his partnership (R. 159:31; R. 160:65, 76, 87). He supported his claim of financial disability with information from only one personal bank account; he provided no account information for either his company or his partnership (R. 160:83-87). Finally, although defendant justified his failure by noting that the trial court's payment schedule was too great, he never moved to modify that schedule (R. 160:53). Thus, though apparently able, defendant took no action that would indicate "he was mindful of his responsibility, and serious about discharging it." *Archuleta*, 812 P.2d at 85.

Defendant's claim that he "provided the Tax Commission with all of the documents he had access to" is similarly flawed. Aplt. Br. at 12. At the June 27th hearing, defendant admitted he had not turned over all the income tax documentation

requested by the Tax Commission (R. 159:9). He claimed most of it was tied up in bankruptcy proceedings, but never took any action to have the documents released or copied (R. 159:10-11, 26-28). At the June 27th hearing, he admitted he had canceled checks to substantiate his charitable deductions that he had not handed over to the Tax Commission despite Ms. McKenzie's repeated requests (R. 159:36-37). At his revocation hearing, defendant again admitted he had receipts to substantiate those deductions, but he had not turned them over to the Tax Commission (R. 160:79). Finally, he admitted that he had not turned over documentation concerning his sales taxes. He explained that the Tax Commission could come and get it whenever they wanted, as if that were sufficient to fulfill his obligations (R. 160:48). Each of these reflects a "willful[] refus[al]" to fulfill the terms of his probation "when he has the means to" do so. *Archuleta*, 812 P.2d at 84 (quoting *Bearden*, 461 U.S. at 668).

Finally, defendant claims he fulfilled his community service "pursuant to the trial court's order of fifty hours a month." Aplt. Br. at 12. However, defendant was specifically ordered to complete his community service with an organization such as a soup kitchen or Salvation Army that had been approved by the prosecutor (R. 159:41-42). Nothing in the record reveals a disability that precluded defendant from complying with the court's order. Yet, he did not do so. Instead, he chose his own organization, thereby avoiding the humbling experience that a soup kitchen or Salvation Army project may have provided (R. 160:58, 60, 64, 118).

Thus, contrary to defendant's contentions on appeal, his conduct before the trial court consistently showed neither that he "was mindful of his responsibility" nor that he was "serious about discharging it." *Archuleta*, 812 P.2d at 85. In light of this evidence, the trial court did not clearly err or abuse its discretion in finding that defendant willfully violated his probation when he failed to follow the court's explicit instructions concerning his community service requirement.

Consequently, defendant's claim fails.

II. THIS COURT LACKS JURISDICTION TO REVIEW DEFENDANT'S SENTENCES BECAUSE HE DID NOT TIMELY APPEAL FROM THE TRIAL COURT'S SENTENCING ORDER

Defendant claims that "the trial court abused its discretion in sentencing the Defendant to consecutive sentences" because the gravity and circumstances of his crimes, his lack of criminal history, his ability to be "a productive member of society," and the ability he demonstrated on probation to "make progress towards rehabilitation" support concurrent, rather than consecutive sentences. Aplt. Br. at 13-15 (citing Utah Code Ann. §76-3-401(4)). However, this Court lacks jurisdiction to consider defendant's claim where he failed to file a timely notice of appeal from the final sentencing judgment.

A. This Court lacks jurisdiction to consider defendant's sentencing claim.

Under rule 4, Utah Rules of Appellate Procedure, defendant must file a notice of appeal "within 30 days after the date of entry of the judgment or order appealed from." Utah R. App. P. 4. "Failure to file a timely notice of appeal deprives this [C]ourt of

jurisdiction over the appeal." *Reisbeck v. HCA Health Servs.*, 2000 UT 48, ¶ 5, 2 P.3d 447; *see also State v. Palmer*, 777 P.2d 521, 522 (Utah App. 1989) (per curiam).

In this case, a final judgment on defendant's sentences was issued on December 17, 1999 (R. 44-47). Defendant, however, did not file a notice of appeal until November 30, 2000 (R. 150). Because he did not file his notice of appeal within thirty days of the trial court's sentencing order, this Court lacks jurisdiction to consider it. *Reisbeck*, 2000 UT 48, at ¶ 5; *Palmer*, 777 P.2d at 522.

Defendant attempts to circumvent this well-settled jurisdictional rule by claiming under rule 22(e), Utah Rules of Criminal Procedure, that the consecutive sentences are "'patently illegal.'" Aplt. Br. at 2 (quoting *State v. Brooks*, 908 P.2d 856 (Utah 1995)). Rule 22(e) provides that "[a] court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R. Crim. P. 22(e).

Yet, nowhere in his argument does defendant demonstrate that his sentence was "patently illegal" or imposed in a "patently illegal" manner. Defendant does not claim that the trial court lacked statutory authority to impose consecutive sentences, nor does he claim that the trial court failed to follow the proper procedure under Utah Code Ann. § 76-3-401(4) when it imposed those sentences. Rather, defendant merely challenges how the trial court exercised its discretion within its statutory authority, presenting his own view of how the trial court should have weighed the statutory factors. Aplt. Br. at 13-15. Such a claim is not cognizable under rule 22(e). *Cf. State v. Elm*, 808 P.2d 1097, 1099

(Utah 1991) (holding defendant "failed to make specific objections to any of these alleged defects at the sentencing hearing . . . and therefore, he has waived his right to raise these issues [on direct appeal]").

Thus, this Court lacks jurisdiction to consider defendant's sentencing claim.

B. In any case, the lack of an adequate record requires this Court to affirm the trial court's decision.

Even if this Court had jurisdiction to consider this claim, the record is inadequate to review it.

"Parties claiming error below and seeking appellate review have the duty and responsibility to support their allegations with an adequate record." *State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993); *see also State v. Litherland*, 2000 UT 76, ¶ 11, 12 P.3d 92 ("On appeal, it is the defendant's obligation to provide supporting arguments by citation to the record."). "'If an appellant fails to provide an adequate record on appeal, this Court must assume the regularity of the proceedings below.'" *Litherland*, 2000 UT 76, at ¶ 11 (quoting *State v. Robertson*, 932 P.2d 1219, 1226 (Utah 1997)).

Here, defendant has failed to provide this Court with a transcript of his sentencing hearing. Thus, this Court must assume that the trial court acted within its discretion in ordering consecutive sentences. *See Litherland*, 2000 UT 76, at ¶ 11; *Robertson*, 932 P.2d at 1226.

Consequently, defendant's claim fails.

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's sentences and the revocation of his probation.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Because this case presents no complex or novel questions, the State does not request that it be set for oral argument or that a published opinion issue.

RESPECTFULLY SUBMITTED 31st August 2001.

MARK L. SHURTLEFF
Utah Attorney General

Karen A. Klucznik
KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 31 August 2001, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to Gregory G. Skordas, Gustin, Christian, Skordas & Caston, L.L.C., Boston Building, Suite 810, 9 Exchange Place, Salt Lake City, Utah 84111, Attorney for Appellant.

Karen A. Klucznik

ADDENDUM A

Rule 22. Sentence, judgment and commitment.

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

(Amended effective January 1, 1995; January 1, 1996.)

UTAH RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of right: when taken.

(a) *Appeal from final judgment and order.* In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) *Motions post judgment or order.* If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court under Rule 24 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) *Filing prior to entry of judgment or order.* Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) *Additional or cross-appeal.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) *Extension of time to appeal.* The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) *Appeal by an inmate confined in an institution.* If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (f), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

(Amended effective November 1, 1998; April 1, 1999.)